In the Supreme Court

OF THE

United States

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OCTOBER TERM, 1944

No. 1217

I. M. WARD,

Petitioner,

vs.

AUCTIONEERS ASSOCIATION OF SOUTHERN CALIFORNIA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

to the District Court of Appeal of the State of California

and

BRIEF IN SUPPORT THEREOF.

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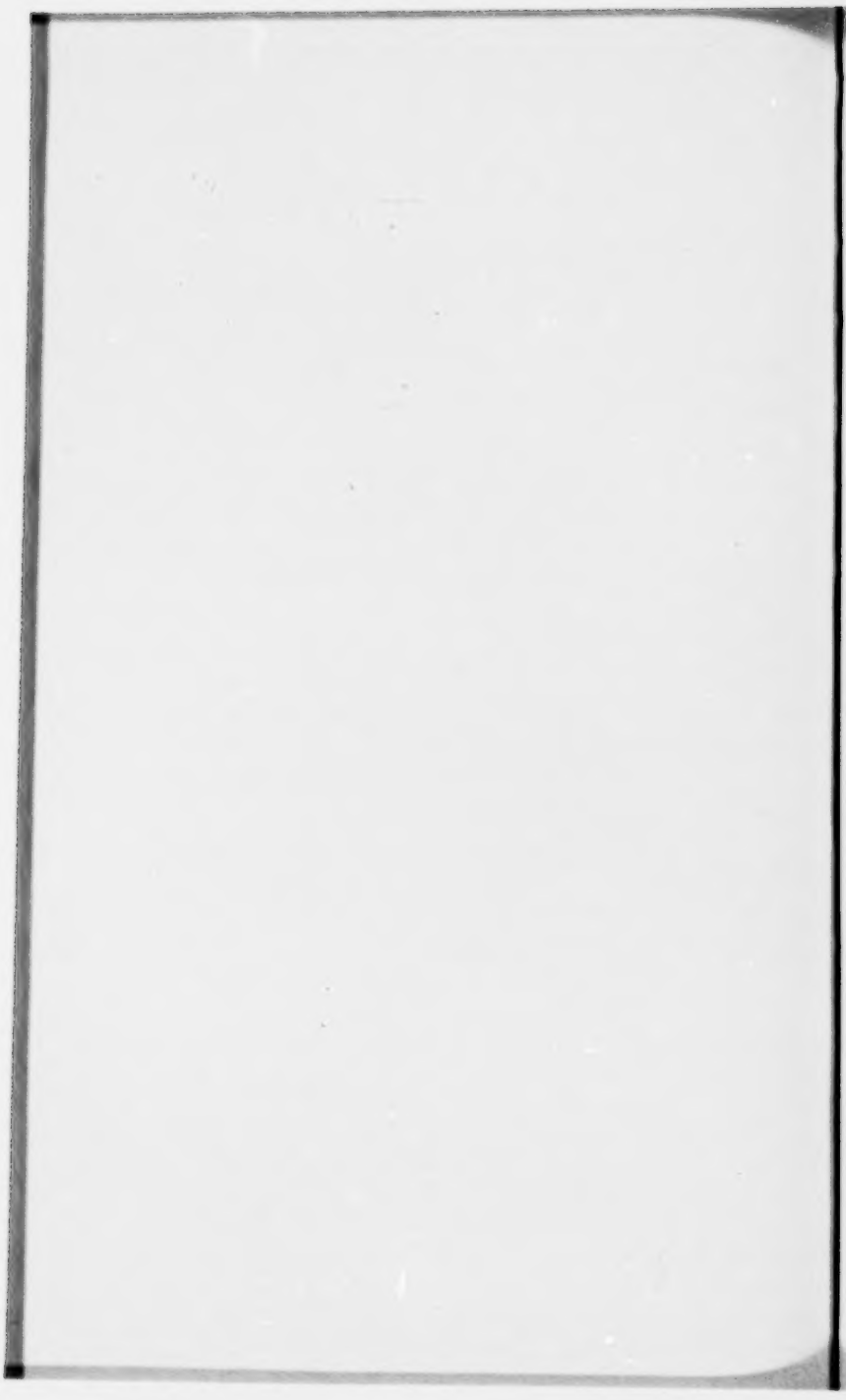

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, I. M. Ward, respectfully prays that a writ of certiorari to review the judgment of the District Court of Appeal of the State of California,

entered in the above case on December 4, 1944 (R. p. 80), and in which a petition for hearing was denied by the Supreme Court of the State of California on February 1, 1945 (R. p. 102), be issued by the Supreme Court of the United States.

OPINION BELOW.

The opinion of the District Court of Appeal of California in the above mentioned case in which the judgment is sought to be reviewed is reported in 67 Advance California Appellate Reports at pages 194-197, inclusive, and appears in the Record, pages 74-79, inclusive.

JURISDICTION.

The judgment of the District Court of Appeal of California was entered on December 4, 1944 (R. p. 80). Under the rules of California procedure more fully set forth below (infra, pages 7-10) a petition for a hearing in the Supreme Court of California was filed on January 12, 1945 (R. p. 93), which petition was denied by the Supreme Court on February 1, 1945. (R. p. 102).

STATUTES INVOLVED.

The case involves the California Anti-Trust statute called the Cartwright Act (Stats. of California, 1907, Chapter 530), amended by Stats. of California, 1909,

Chapter 362. The Anti-Trust Act as so amended was incorporated into the Business and Professions Code of California in 1941, and became Sections 16,700 to 16,758 of that Code.

The judgment in the above case declared the Cartwright Act to be unconstitutional as in violation of the Fourteenth Amendment to the Constitution of the United States.

REASONS FOR THE EXERCISE OF THE DISCRETION OF THIS COURT AND FOR THE ISSUANCE OF THE WRIT OF CERTIORARI AS PRAYED FOR.

The special reasons which in the opinion of the petitioner warrant this court in the exercise of a sound judicial discretion, in issuing a writ of certiorari, are the following:

(1) The District Court of Appeal has decided a Federal question, to wit, that a state may not pass a statute granting a civil action for relief against a combination to restrict trade (Stats. California, 1907, Chapter 530) if a subsequent amendment provides that in such combinations a reasonable profit may be lawfully made. (Stats. of California, 1909, Chapter 362).

(2) The said decision of the District Court of California is not in accord with applicable decisions of this court; and

(3) Certiorari is requested in order to prevent the invalidation of an important legislative policy of the State of California, to wit, the legislation to

protect the community against monopolistic practices. This question has not in this form been previously decided by this court, since the decision on which the judgment of the District Court of California is based, *Cline v. Frink*, 274 U. S. 445 (47 S. Ct. 681, 71 L. Ed. 1146) is founded on a wholly different set of facts and deals with a different legal question.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

On November 29, 1943, the plaintiff filed an amended complaint for damages of $100,000 against the defendants. The complaint was entitled "Complaint for Damages for Unlawful Monopoly under the Cartwright Act".

The Cartwright Act, supra, enumerated certain trusts (Bus. and Prof. Code, Sec. 16,720) and declared those trusts void, section 16,726, with exceptions indicated in sections 16,723-16,725, and in section 16,750 granted an action to any person injured in his business by any act declared unlawful by the Cartwright Act.

On December 11, 1943, the defendants demurred to the amended complaint.

On December 23, 1943, a minute order was entered in the Superior Court of Los Angeles County, Department 35, Honorable Alfred L. Bartlett, presiding, sustaining the demurrer to the amended complaint, without leave to amend, but denying a motion for dismissal of the complaint.

On January 21, 1944, judgment was rendered by the same court that the plaintiff take, have and recover nothing by virture of the above entitled action.

Appeal was taken from this judgment to the District Court of Appeal of the Second Appellate District. This appeal was duly heard by the District Court of Appeal of the Second Appellate District, Division Two, and on December 4, 1944, judgment was rendered affirming the judgment of the Superior Court.

In his amended complaint plaintiff named as defendants Auctioneers Association of Southern California, a corporation, an association bearing the same name as the corporation, and the individual members of the Association. He alleged that plaintiff was a licensed auctioneer; that plaintiff and defendants were engaged in the business of conducting auction sales, and that defendants owned and controlled 98 per cent of the auction business; that prior to March 15, 1943, the auction business was open and competitive and that plaintiff and defendants had free access to advise the public that they were engaged in the auction business and of the times and places of sales and merchandise to be sold; that beginning March 15, 1943, defendants conspired, confederated and combined to carry out restrictions in said trade, business and commerce, and in furtherance thereof formed Auctioneers Association of Southern California and excluded plaintiff therefrom; that for many years prior to the formation of the association all auctioneers had used as their method of advising the

public of auction sales to be conducted by them and for soliciting auction business, the auction pages of the Sunday editions of the Los Angeles Times and the Los Angeles Examiner, and that prior to March 15, 1943, these newspapers had printed all auction advertising on the same pages; that in furtherance of the conspiracy defendants obtained agreements from the publishers to reserve all advertising space on said pages to the members of the association and that the newspapers thereafter refused to accept or print any advertising of plaintiff on the pages referred to, although plaintiff had written contracts with the papers to do so. Plaintiff further alleged that the acts and conduct of defendants prevented competition in the auction business and that as a result he was damaged, for which he seeks a money judgment.

These facts, so far as they are relevant, are admitted by the demurrer, and no issue is presented on the facts or the merits of the case.

ASSIGNMENT OF ERRORS.

The District Court of Appeal of California erred:

(1) In holding that the entire Cartwright Act (Stats. of California, 1907, Chapter 530, amended 1909, Chapter 362, Business and Professions Code, sections 16,700-16,758) was unconstitutional.

(2) In holding as a matter of Federal law that an invalid amendment enacted after a statute renders the entire statute invalid.

(3) In holding that if a provision in an act is invalid when applied to criminal penalties, it must also be invalid when applied to civil relief of an injured party.

SUMMARY OF THE ARGUMENT.

I.

The petition is timely.

II.

If a statute is amended and the amendment is declared to be unconstitutional, this does not of itself render the statute unconstitutional, as it stood before amendment.

III.

Terms like "reasonable" may be too vague to be a standard of guilt in a criminal statute, but may be a valid basis for predicating civil liability.

IV.

The one case relied upon in the court below is easily distinguishable from the case at bar.

ARGUMENT.

I.

THE TIMELINESS OF THE PETITION.

The decision of the District Court of Appeal of California was in this case a decision of "the highest

court of the State in which a decision could be had" (Judicial Code, sec. 277, 28 U. S. C. A. sec. 344). Under the California law, the District Courts of Appeal have appellate jurisdiction on appeal from the Superior Courts (except in cases in which appellate jurisdiction is given to the Supreme Court) in all cases at law in which the Superior Courts are given original jurisdiction.

Constitution of California, sec. 4(b).

Under section 4(c) of the Constitution of California a judgment of the District Court of Appeal becomes final sixty days after it has been pronounced. Such a judgment is deemed vacated if within sixty days the Supreme Court orders a hearing before itself.

Estate of Stierlen, 199 Cal. 140, 248 Pac. 509.

If, however, the Supreme Courts fails to order a hearing before itself, the decision of the District Court of Appeal is final for all purposes at the end of the sixty-day period.

People v. Ruef (1910), 14 Cal. App. 576, 625, 114 Pac. 48.

Rule 28 (a) and (b) of Rules on Appeal for the Supreme Court and District Courts of Appeal, adopted by the Judicial Council and made effective July 1, 1943 (22 Cal. (2) 20), provides:

> (a) (Time within which court may grant hearing). With 30 days in criminal causes and *60 days* in other causes, after the filing of a decision of the District Court of Appeal, the Supreme Court, on its own motion, or on petition may

order the cause transferred to itself for hearing and decision.

(b) (Time for filing petition). A party seeking a hearing must serve and file a petition therefor within 22 days in criminal causes, and 40 days in other causes, after the filing of the decision of the District Court of Appeal. * * *"

In this cause, the District Court of Appeal on December 4, 1944 (supra) filed its decision affirming the judgment of the Superior Court sustaining the defendants' demurrer without leave to amend, and on January 12, 1945, 39 days after the filing of the decision, the plaintiff petitioned the Supreme Court of California for a hearing in the cause. On February 1, 1945, within the sixty days allowed by Rule 28(a) of the Rules on Appeal, the Supreme Court denied the petition. This made the decision of the District Court of Appeal final in the sense required by the Judicial Code of the United States (supra).

In *Pacific Gas and Electric Co. v. Police Court of Sacramento* (251 U. S. 22) this court permitted a writ of error to run to the District Court of Appeal of California, Third Appellate District, after a showing that the appellant had exhausted his remedy in California.

Cf. also:

Randall v. Board of Commissioners of Tippecanoe Co., Indiana, 261 U. S. 252;

Prudential Ins. Co. v. Cheek, 259 U. S. 530, at p. 534.

The time for petitioning this court for certiorari runs from the entry of the final judgment of the highest court of the State in which decision could be had, except where the highest court of the state refuses to exercise its discretionary right to review, in which case the time to apply for review by this court runs from the date of such refusal by the highest state court, although the judgment or decree to be reviewed is that of the inferior state court.

Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, 1936, page 720, section 353.

Cf.:

American Express Co. v. Levee, 263 U. S. 19, at p. 21.

"*Of course,* the limit of time for applying to this court was from the date when the writ of certiorari (*sc.* in that instance before the Supreme Court of Louisiana) was refused." (Emphasis added.)

Under section 8 of the Act of February 13, 1925 (28 U. S. C. A., sec. 350), the time within which a petition for a writ of certiorari must be made is three months. This petition is filed well within the three months of the denial on February 1, 1945, of the petition for a hearing by the Supreme Court of California, which, as stated in the case mentioned above (*Am. Express v. Levee,* 263 U. S. 21), is "of course" the date at which the limit of time begins to run.

II.

AN INVALID AMENDMENT DOES NOT INVALIDATE THE AMENDED ACT.

The decision of the District Court of Appeal (67 Advance California Appellate Reports, 194) was "that the Cartwright Act was unconstitutional because it violated the Fourteenth Amendment to the Constitution of the United States". As stated in the decision, the Cartwright Act is now part of the Business and Professions Code of the State of California adopted as a code on June 15, 1937. The provisions of the Cartwright Act begin at section 16,700 of the Business and Professions Code and run to section 16,758 of the same code.

It is indicated in the Code that these sections were based on Statutes of California, 1907, Chapter 530, pp. 984, ff.

The reason assigned for holding that the Cartwright Act was unconstitutional was that the Cartwright Act was "almost identical" in its terms with the Colorado Anti-Trust Act and that the Colorado Anti-Trust Act was declared void by the Supreme Court of the United States in the case of *Cline v. Frink Dairy Co.*, 274 U. S. 445 (47 S. Ct. 681, 71 L. Ed. 1146). No other reason is advanced by the District Court of Appeal for affirming the decision in the lower court, except the finding that the Cartwright Act violated the Constitution of the United States.

This court in the case of *Cline v. Frink*, supra, declared that the reason for striking down the Colorado statute was that a certain provision in their

statute left the whole statute without a fixed standard of guilt in an adjudication involving the liberty of one accused. (*Cline v. Frink*, 274 U. S. 445, at p. 457.)

When this court in the *Cline* case found that this particular provision in the Colorado statute rendered the act unconstitutional as to those "who are convicted and prosecuted under it" (ibid. p. 466), it was considering a provision which could be regarded as an integral part of the act declared to be void in one aspect of its application. The statute was the Colorado Anti-Trust Act, being Chapter 161 of the Session Laws of the State of Colorado, for 1913. It contained a proviso which is substantially the same as sections 16,723, 16,724 of the Business and Professions Code of California. The proviso of the Colorado Act was part of the original enactment. The Colorado Supreme Court had not passed on the question of construction, and it was therefore open to this court to presume that this proviso was an essential part of the enactment of the Colorado statute, and that, if it had not been present, the statute would not have been enacted at all.

But no such presumption can be induged in the case now before the court. Sections 16,723 and 16,724 of the Business and Professions Code of California which the District Court of Appeal of California has declared to be unconstitutional, were not part of the original Cartwright Act at all, which was Chapter 530 of the California statutes of 1907. These sections were not added to the Cartwright Act until 1909, being chapter 362 of the Statutes of 1909.

It is impossible therefore to declare that these sections were so essential and integral a part of the original act that if they were stricken out the statute would not have been passed. On the contrary, it is clear that the statute *was* passed, without these sections. If, therefore, the case of *Cline v. Frink* applies to the instant case at all, it would tend at most to strike out the amendment of 1909, since no other part of the act is referred to. We should then have to read the act without the amendment, and there is nothing in the case of *Cline v. Frink* to suggest that without these amendments there would be any question of the constitutionality of the act.

If it were conceded that the amendment of 1909, so far as its effect on the criminal provisions of the Cartwright Act was concerned, was unconstitutional, certainly this could have no effect on the Act as it stood without these amendments. The authority for this proposition is overwhelming. We may cite first the statement of this court in the case of *Frost v. Corporation Commission,* 278 U. S. 515, at page 526:

> "Here it is conceded that the statute, before the amendments, was entirely valid. When passed it expressed the will of the legislature which enacted it. Without an *express* repeal, a *different legislature* undertook to create an exception, but since that body sought to express its will by an amendment which, being unconstitutional was a nullity and, therefore, powerless to work any change in the existing statute, that statute must stand as the only valid expression of the legislative intent."

It would be hard to find a more complete statement of the law and a more precise analogy to the case at bar. The court is discussing a state statute (ibid, p. 517) being Statutes of Oklahoma 1921, section 3712, not a Federal one.

The opinion goes on (p. 527) to discuss other Federal and State cases to the same effect, including *Truax v. Corrigan,* 257 U. S. 312, 341 and ends the paragraph with the following statement (p. 527):

> "The question is not affected by the fact that the amendment was accomplished by inserting a proviso in the body of the original section and reenacting the whole at length."

Obviously, *a fortiori,* it cannot be affected when the proviso or exception, while inserted in the body of the act, was *not* followed by a complete reenactment of the whole act. While the Cartwright Act was incorporated into the Business and Professions Code of California, sections 16,700 to 16,758, it was so inserted under the application of section 2 of that Code.

Business and Professions Code, section 2:

> "Continuation of existing law. The provisions of this code in so far as they are substantially the same as existing statutory provisions relating to the same subject matter shall be construed as restatements and continuations thereof, and *not as new enactments.*" (Emphasis added).

Since the court which decided the case of *Cline v. Frink, supra,* was exactly the same court in membership as that which *subsequently* decided the case of *Frost v. Commission* (supra), it can be reason-

ably inferred that if the unconstitutional exception had been incorporated into the Colorado statute by amendment subsequent to the enactment of the statute, this court would not have declared the entire Colorado statute, even in its criminal aspect, to be unconstitutional.

Not only is this the rule in this court, but it is the rule of California. We may cite:

Lewis v. Dunne, 134 Cal. 291;
Matter of Clarey, 149 Cal. 732;
Ex parte Sohncke, 148 Cal. 262.

To which may be added the recent case of *Miller v. Union B. & T. Co.,* 7 Cal. (2d) 31, 59 Pac. (2d) 1024, Cert. denied, 299 U. S. 612, in which it was decided that the 1923 amendment of subdivision 3(c) of section 2 of the Corporate Securities Act violated the Constitution of California, but that such invalidity in no way affected any other portion of the act.

"Generally stated", says the court (ibid., p. 36) "the rule is that when discrimination or unconstitutionality results from a statutory amendment, it is the amendment which is invalid and not the original portions of the statute".

The court cites the case of *Frost v. Commission* (supra), the reasoning of which it adopts and which thus becomes the last statement of the law of California on this subject, as it is of this court.

No case has been cited and no case has been found upon reasonably diligent search in which the finding by a court that an amendment is unconstitutional has been permitted to invalidate the statute amended.

If this were a decision that in California an invalid amendment *as a matter of state law* repeals the entire amended statute, despite the rules against implied repeal and despite the previous decisions of the California Supreme Court, it would concededly not be subject to review by this court. But that is not the case.

The District Court of Appeal did not decide that sections 16,723-16,724 of the Business and Professions Code of California were void under California law, but that they were void as a matter of Federal law. In order to make them void, it presented what, it is submitted, is an erroneous interpretation of the Fourteenth Amendment to the Constitution of the United States and based it on what seems to the petitioner a wholly erroneous interpretation of a decision of this court, *Cline v. Frink* (supra).

Nor did it decide the effect of an unconstitutional amendment as a matter of California law. It did, it is true, speak of these sections as "inseparable" from the rest of the Cartwright Act, but it expressly based this characterization of them on the fact that in *Cline v. Frink* this court had declared the proviso in the Colorado statute to be inseparable from the rest of the statute. The California District Court of Appeal, in the case at bar, did not advert to the vital difference in the statutes, so far as the relation of the proviso to the entire law was concerned. It did not even mention, much less decide, that there was no difference between the effect of later amendment which is declared to be unconstitutional and an unconstitutional proviso which is part of the original statute.

The only decision which does advert to this difference and which, it is submitted, erroneously declares the difference to be immaterial, is the decision of *Blake v. Paramount Pictures* (22 Fed. Supp. 249) which is a decision of the Federal District Court and is therefore in no sense authoritative for California law. Although *Blake v. Paramount Pictures* was referred to in argument by the respondents, it is nowhere mentioned by the District Court of Appeal in their decision.

It is clear, therefore, that in asking for a review of this case, the petitioner is not presenting a matter of California law, but of Federal law, and on this Federal question the decision is directly at variance with the decision of this court in *Frost v. Commission* (supra). It will be remembered that in that case this court was also construing a state statute (supra) and held that an amendment in violation of the Federal Constitution did not affect the statute itself.

III.

THE DECISION IN CLINE v. FRINK DAIRY CO. DOES NOT CONTROL THIS CASE.

But even if the Cartwright Act had contained the challenged proviso in its original form there would have been nothing unconstitutional in applying the Act to the situation before the court in this case.

The decision in the District Court of Appeal of California, as has been stated, is wholly predicated on the decision of this court in the case of *Cline v.*

Frink Dairy Co., 274 U. S. 445. The only other case cited in the opinion is the case of *In re Battelle*, 207 Cal. 227, 251, and that case is mentioned merely for the casual statement that the Colorado Anti-Trust Act is a "replica of the Cartwright Act". In the argument before the District Court of Appeal, the respondents relied strongly on the *Cline* case and on the case of *Blake v. Paramount Pictures*, 22 Fed. Supp. 249, decided in the District Court of the United States, which held that the decision in the case of *Cline v. Frink* required the declaration that the Cartwright Act like the Colorado Anti-Trust Act was wholly unconstitutional.

But the decision in the *Cline* case rested upon a wholly different foundation from any that can be assigned to the case at bar. In the *Cline* case, the respondent Dairy Company had sought and obtained an injunction against the District Attorney for the City and County of Denver, Colorado, enjoining him from prosecuting the respondent for violation of the Colorado Anti-Trust Act, a violation which subjected the company and its directors to criminal penalties.

It is these criminal penalties, and these alone, which are made the basis of the decision of this court in *Cline v. Frink Co.*

This is apparent from the entire case. The final decision is expressed in these words:

> "We conclude that the Anti-Trust statute of Colorado is void in that those who are *prosecuted and convicted* under it will be denied due process of law." (Page 465).

To which we may add the following:

> "We think that the Act is so vague and uncertain in its description of what shall constitute *its criminal violations* that it is invalid under the Fourteenth Amendment." (Page 453).
>
> "We are now considering a case of state legislation and threatened prosecution in a state court where only the Fourteenth Amendment applies: but that amendment requires that there shall be due process of law, and this certainly imposes upon a State an obligation to frame *its criminal statutes* so that those to whom they are addressed may know what standard of conduct is intended to be required." (Page 458).
>
> "We held that the provision (sc. of an Oklahoma statute) contained no ascertainable *standard of guilt.*" (Page 459).
>
> "But it will not do to hold an average man *to the peril of an indictment* for the unwise exercise of his economic or business knowledge." (Page 465).

This court in the *Cline* case leaned heavily on the case of *United States v. Cohen Grocery Co.*, 255 U. S. 81, in which it was held that a section of the Lever Act (41 U. S. Stat. 297), of October 22, 1919, was void because it imposed a *criminal penalty* for a conspiracy to "exact excessive prices for necessaries". The term "excessive" was held to be too vague to create "an ascertainable standard of *guilt*". It is only this section of the Lever Act which was stricken down in the *Cohen Grocery* case. And the court went on to say in that case (cited in the *Cline* case, page 454):

> "Observe that the section forbids no specific or definite act."

The court, in the *Cline* case, admits that in many situations, terms like "reasonable", "undue" and the like, terms which involve the application of standards of conduct and which in the last analysis must be applied by a jury, are used even in criminal statutes (pp. 460-465) but it distinguishes these situations from that presented in the case before it and finds that to use such standards in the situation of the *Cline* case in order to determine guilt makes a statute void.

It is quite true that in the case of *Small Co. v. American Sugar Refinery Co.*, 267 U. S. 233, in an opinion written by Justice McReynolds, the court declared that the uncertainty involved in the standards set up in the Lever Act might make the act unconstitutional in civil matters as well as criminal. The case dealt with a purchase of sugar challenged as excessive under that Act. And in *Standard Chemical Co. v. Waugh*, 231 N. Y. 51, the majority in the New York Court of Appeal, in an opinion of Mr. Justice Cardozo, held that the Lever Act, as applied to a purchase of chemicals, was void because the standards set up to test validity, were uncertain and vague. The *Standard Chemical* case is quoted with approval by this court in the *Small* case, but neither case, nor yet the case of *Druman v. South Texas Lumber Co.*, 252 S. W. 274, 275, also cited by Mr. Justice McReynolds, can be taken to support the contention that the mere use of a term like "reasonable", as a test of legally permitted conduct, renders a legislative enactment

void in all its civil, as well as in its criminal, applications.

Both the *Small* and the *Standard Chemical* cases, which it quotes, were before this court in the *Cline* case, and if there was no difference between civil and criminal cases in the application of the term "reasonable profits", it would have been wholly unnecessary to stress exclusively as the court does in the *Cline* case (supra) the criminal character of the act involved.

So far from making the invalidity of the "reasonable test" as generally effective in civil cases as in criminal, this court in *Small v. American Sugar Refinery* (supra) took especial pains to state that this was not so. The court distinguished *Levy Leasing Co. v. Siegel,* 258 U. S. 242, in which a statute making unreasonable rents invalid was upheld as constitutional, by saying the following:

> "In Levy Leasing Co. v. Siegel, a civil case arising out of the war-time rent law of the State of New York, this court referred to the L. Cohen Grocery case as 'dealing with definitions of crime' and declared it not applicable."

The important part of the reference was the declaration that the decision was not applicable to the case then under consideration. One dealt with a Federal statute prohibiting the sale of sugar at unjust, unreasonable and excessive prices, and the other with a state statute directed against reserving unjust, unreasonable and oppressive rent in the leasing of real property in a city for dwelling purposes".

The case of *Levy Leasing Co. v. Siegel* has been frequently cited, most recently in *Bowles v. Willingham,* 321 U. S. 503, 517.

We may also compare *Federal Power Commission v. Hope Co.,* 320 U. S. 591.

Indeed, in *Carter v. Carter Coal Co.,* 298 U. S. 238, at page 333, Justice Cardozo, whose statement in the *Standard Chemical* case is the basis of Justice McReynolds reasoning in the *Small* case, strongly asserts that the test of "reasonableness" may well be constitutional in civil cases. Again, in *Morehead v. Tipaldo,* 298 U. S. 587, 632, in Justice Stone's dissenting opinion, the use of this test to invalidate a labor contract was upheld as constitutional and the *Levy Leasing Co.* case was cited. It will be remembered that the *Morehead* case was in effect overruled in *West Coast Hotel v. Parrish,* 300 U. S. 379, 399, so that the dissent in the former case represented the majority in the latter.

If the *Small* case is taken to be a statement that in general the term "reasonable" or "excessive" in a statute regulating commercial activity of any kind makes the statute void, it may be said that the cases mentioned, *Carter v. Carter Coal Co.* (supra), *Federal Power Comm. v. Hope Co.* (supra), *Bowles v. Willingham* (supra), all later than the *Small* case, have disapproved of this excessive extension of the doctrine of the *Cohen Grocery* case. Indeed, the *Small* case has been since cited only to support the doctrine that "reasonable" and "excessive" are insufficient

guides in a criminal prosecution, and not to support a general application of that doctrine to civil suits.

There seems to be little doubt that the *Levy Leasing* case correctly states the law. And since, as stated in the *Small* case, the difference of the situation saved the constitutionality of the New York Act in spite of the fact that it applied a test of "reasonability", attention is here respectfully directed to the difference between the situation in this case and the situations in all the cases, the *Small* case and the *Standard Chemical* case, in which the reasonability test was held to make the Act unconstitutional. All of them were cases in which prices of commodities were set which were challenged as unreasonable. This was also in the *Cline* case. The court dwelt on the difficulties involved in deciding whether a profit earned or a price charged was or was not reasonable.

But when the question involved, not the sale of a commodity but the renting of a house, the court felt that the maintenance of a reasonable standard in rent was not so vague and uncertain as to make the law requiring such a standard, void as unconstitutional.

In the case at bar, there is no question of the sale of commodities. The business involved is that of rendering services. The plaintiff and respondents are auctioneers. The respondents combined, not to set an unreasonable price on goods, but simply to keep the petitioner from doing business. The applicable section of the Cartwright Act (Business and Professions Code, sec. 16,720a) forbade a combination which attempts "to create or carry on restric-

tion in trade or commerce". The complaint alleges and the demurrer for the purposes of this action admits, that the defendants controlling 98% of the auction business in the City of Los Angeles, California, combined to induce two of the largest newspapers in that city to refuse to accept advertisements from the petitioner, a licensed auctioneer, and thus to deprive the petitioner of one of the most effective ways of carrying on the business for which he had been duly licensed.

Even if the act, as it now stands, had been enacted as a single statute, so that the later enacted proviso (Business and Professions Code, sections 16,723, 16,-724) could be regarded as an integral part of the Act, the situation would be fundamentally different from that of the *Cline* case. The defendants there could claim that their combination was to secure a reasonable profit on what they sold. It is said in the *Cline* case:

> "It would, therefore, be a complete defense for the defendant to prove in this case that it is impossible to sell milk and milk products except by trust methods and make a reasonable profit, if he also showed that by such methods he had in fact only made a reasonable profit." (Page 457).

It is merely necessary to consider these words, on which the entire decision in the *Cline* case is based, to see how inapplicable they are to the case at bar. It is not conceivable that the defendants could assert that in order to make a reasonable profit they must have the power of driving a single competitor out

of the business for which he had been duly licensed by the competent authorities of his city. Certainly, they would not be heard if they had offered such proof. The very nature of the business excludes the application of the proviso contained in the two sections of the Code in question, sec. 16,723, 16,724.

It is expressly declared that if the "reasonableness" had been the kind of reasonableness used in determining "forbidden and permissible restraints of trade" at the common law (page 460) there would have been no objection to it, even in a criminal statute. Indeed, if this test of reasonableness were not applied, the Sherman Anti-Trust law would have to be declared unconstitutional.

Nash v. United States, 229 U. S. 373.

The deliberate exclusion of a competitor by machinations and combinations is the very essence of forbidden restraints of trade at common law, and in regard to this there can be no gradations and no issue of reasonability.

The invalidity of the Lever Act or the Colorado Act was due to the fact that it penalized a combination which would have been legal at the common law, at any rate at the later common law, after the laws against forestalling and regrating had fallen into abeyance. The case of *United States v. Addystone Pipe Co.,* 175 U. S. 211, presents a situation in which conduct permissible or forbidden at common law had created a tradition of what was reasonable and what was not. Well within that tradition of unreasonability are to be found acts which arbitrarily drive a competi-

tor from business for no better reason than that he is a competitor.

The fact that some of the cases are those in which war emergency legislation was involved cannot affect the law of the case. The *Small* case (supra) and the *Standard Chemical* case (supra) held that "reasonable" and "excessive" prices were too difficult to determine. This difficulty, it is submitted, would be far greater during a war emergency.

Accordingly, even if the criminal penalties and not the most characteristic of common law civil remedies, had been invoked by the petitioner, the case would not come within the reasoning of *Cline v. Frick Co.,* which is the sole basis of the decision here sought to be reviewed.

Just as a statute, even if not void on its face, may be challenged as unconstitutional because void as applied, *Dahnke-Walker Milling Co. v. Bondurant,* 257 U. S. 272; *Whitney v. California,* 274 U. S. 378 (concurring opinion of Brandeis and Holmes, JJ.) so a statute which might be unconstitutional if applied in one way, may be perfectly constitutional if applied in another.

If it be true that "no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes" (*Lanzetta v. New Jersey,* 306 U. S. 451, 453) it is equally true that where, as in this case, the statute forbids combination to restrict trade, no speculation is necessary to apprise a violator that to combine to prevent a competitor from en-

gaging in competition, outside the well-known common law exceptions, is a combination to restrict trade.

This court has never passed on the question whether the decision in the *Cline* case, the *Cohen Grocery* case, the *Small* case, all of which deal with sales of commodities, may without more be applied to the business of auctioneering or the rendering of services in general. The New York rent case, *Levy Leasing Co. v. Siegel,* 258 U. S. 242, frequently cited with approval, would seem to indicate that the decisions are inapplicable.

IV.

THE CARTWRIGHT ACT IS AN IMPORTANT PIECE OF LEGISLATION AND ITS TOTAL INVALIDATION ENABLES COMPETITION TO BE STIFLED AGAINST COMMON LAW AND PUBLIC POLICY.

The Cartwright Act is a State Anti-Trust Act supplementing the Federal Sherman Anti-Trust Act. The Federal Act applies to interstate commerce. The Cartwright Act and similar state acts, apply the same principles to intrastate commerce. This state legislation furnishes a highly important aid to the carrying out of the very public policy which is enforced by the common law precedents referred to in the *Cline* case (supra), a public policy declared in almost every state of the Union to be essential to its economic and social welfare.

That policy is the suppression of monopoly, or at any rate, the checking of monopoly. In this respect the Sherman Act, the Clayton Act and the Cartwright

Act reinforce long-established law and continue a struggle as old as the establishment of our national independence. The purpose of the Cartwright Act, as of all similar acts, besides the creation of penal sanctions not at issue here, is to simplify procedures of redress for those adversely affected by these monopolistic practices, denounced for so long a period of time by American common law and American legislation, both State and Federal.

Every single state in the Union with the exception of Vermont, has either by statute or by judicial decision declared that monopoly in whatever form it is attempted, by whatever devices it is carried out, is a pernicious practice; that it runs wholly counter to the foundation of our economy, and that the public interest is eminently served when monopoly in all its forms is eliminated so far as is possible.

Compare for the list of state statutes and decisions Volume I and Supplement of the Marketing Laws Survey Project, sponsored by the Department of Commerce and carried out by the Work Projects Administration, at Los Angeles, California, in 1942.

Several of the monographs published for the Temporary National Economic Committee, set up by the Seventy-sixth Congress to "investigate the concentration of economic power" have dealt specifically with the problem of the control of monopoly by means of "anti-trust" laws like the Federal Sherman Act and the Clayton Act and the state laws like the Cartwright Act of California. Of these monographs we may cite:

No. 16, *Antitrust in Action*: prepared by Walton Hamilton and Irene Till;

No. 21, *Competition and Monopoly in American Industry;* prepared by Dr. Clair Wilcox.

No. 38, *A Study of the Construction and Enforcement of the Federal Anti-trust Laws;* prepared by Milton Handler.

These three writers are trained economists, and in two instances, Mr. Hamilton and Mr. Handler, trained lawyers as well. They are aware of the difficulties of enforcing anti-trust laws. But the complaint they make of them is that they are not severe enough and not sufficiently enforced.

Dr. Wilcox (Monograph No. 21, pp. 16-18) gives ten of the injuries to our economic system caused by monopoly.

"First: it causes an uneconomic allocation of productive resources. * * *

"Second: monopoly offers the consumer no protection against extortion. * * *

"Third: monopoly offers the worker no protection against low wages, long hours and poor conditions of employment. * * *

"Fourth: monopoly inflicts no penalty on inefficiency. * * *

"Fifth: monopoly is not conducive to economic progress. * * *

"Sixth: monopoly prevents the full utilization of productive capacity. * * *

"Seventh: monopoly obstructs adjustments to economic change. * * *

"Eighth: monopoly impedes the raising of the general plane of living. * * *

"Ninth: monopoly contributes to inequality in the distribution of income. * * *

"Tenth and finally: monopoly threatens the existence of private enterprise and representative government. * * *

"In the words of the Federal Trade Commission (Hearings, TNEC, 76th Cong. 1st Sess., Part 5, p. 2200) 'The capitalist system of free initiative is not immortal, but is capable of dying and of dragging down with it the system of democratic government. Monopoly constitutes the death of capitalism and the genesis of authoritarian government'."

Mr. Handler in Monograph No. 38, p. 100, ends his penetrating analysis of the enforcement of statutes identical in purpose with the Cartwright Act, e. g., the Sherman Anti-Trust Act (U. S. C. Title 15, Sec. 1) and the Clayton Act (U. S. C. Title 15, Sec. 12), with these words:

"Our study of the anti-trust laws and their administration has satisfied us that the objectives of these laws are socially desirable, are economically sound and are capable of practical attainment."

And finally Mr. Walton Hamilton, who in some respects is the sharpest critic of anti-trust laws, criticizes them only because they are not severely enough enforced. He states (Monograph No. 16, p. 119):

> "Antitrust is a symbol of democracy. It is an assertion that every industry is affected with a public interest. Quite apart from its operation, it keeps alive within law and public policy a value which must not be sacrificed or abridged. It asserts the firm, the trade, the economy to be the instrument of the general welfare."

This court in the recent decision of the *State of Georgia v. Pennsylvania R. R.* decided March 26, 1945 (13 U. S. Law Week 4287) has reaffirmed the general policy of the United States in the matter of conspiracy to restrain trade, the conspiracy which the Cartwright Act sought to prevent and *which the decision of the District Court of Appeal, here sought to be reviewed, not only clothes with complete legal immunity, civil as well as criminal, but declares is constitutionally immune from any attempt of the State to suppress or prevent.* The conspiracy in the case of *Georgia v. Pennsylvania R. R.* related to establishing discriminatory rates. These rates, said Mr. Justice Douglas, "may cause a blight no less serious than the spread of noxious gas over the land or the deposit of sewage in the streams. They may affect the prosperity and welfare of the state as profoundly as any diversion of waters from the rivers."

The practices of the respondent in this case are only one example of those sought to be avoided by the Cartwright Act and other examples within the definition of unlawful combination of that Act include precisely those combinations to control rates for service which are the subject of the court's animadversion in the *Georgia* case.

The Interstate Commerce Commission has the duty, it is said in the case just cited (13 U. S. Law Week 4290) "to give weight to the anti-trust policy of the nation before approving mergers and combinations" and quotes to the same effect the case of *McLean Trucking Co. v. United States*, 321 U. S. 67. And while the case of *Georgia v. Pennsylvania R. R.* was decided by a divided court, the dissent was based upon the questioned right of the State to appear on behalf of its citizens. No doubt is expressed that a "conspiracy to adopt and maintain unjust, unlawful, excessive or discriminatory freight rates" is an actionable wrong. 13 U. S. Law Week 4295.) Both these recent statements of this court reaffirm the fundamental character of the anti-trust policy of the federal government. The Cartwright Act was designed to further that anti-trust policy by adding state enforcement to what the federal government with so much force is attempting to do for the entire country.

The business of auctioneering is sufficiently affected with a public interest to permit the State or the City to require those who engage in it to be licensed. Such a license was obtained by the petitioner. Licenses to conduct the business of auctioneering are required under the Municipal Code of the City of Los Angeles, California, Section 21.55. This business is further regulated by Chapter 2, Article 4 of that Code. Section 24.00, g, of the Code requires that in order to conduct the business of auctioneering "applicant shall furnish sufficient and satisfactory proof

of good moral character and such other qualifications as the Board may require".

What we have here is therefore a situation in which a group of persons undertake by combination and conspiracy—the combination and conspiracy are admitted by the demurrer—to render the license ineffectual by exercising an economic compulsion upon the newspapers in which the petitioner must advertise to attract employment of his services. Under the conditions of a large city, only such newspaper advertising will enable him to get such employment.

It is alleged by the petitioner and admitted by the demurrer that the newspapers were willing to accept his advertisements and yielded to the pressure of the respondents when they refused them later.

It is to prevent this that section 16,720(a) of the Cartwright Act declaring illegal a "trust" which had as its purpose "to create or carry out restrictions in trade or commerce" and to this the proviso in section 16,723 and 16,724, whether constitutional or not, has no application, since no "reasonable profits" can be predicated on an arbitrary exclusion of a competitor from business. To give the proviso, which entered the act as a later amendment, the force of invalidating the entire act, threatens not only the California Cartwright Act but the entire scheme of legislation designed to check monopoly, especially in the direct and brutal form of conspiring to deny a competitor a chance to make a living.

Certainly it is an astounding holding to say that the State of California is prevented by the Fourteenth Amendment from carrying out a policy which lies at the foundation of our economic system and which protects its citizens from being deprived of their livelihood by conspiracy of their competitors. The oppressive acts which drove the American colonists into rebellion arose from just such commercial monopolies as those which the Cartwright Act defines and declares to be unlawful. If the Cartwright Act is unconstitutional—with or without the Amendment of 1909—it is hard to see what constitutional warrant there can be for the Sherman Act, the Clayton Act, the Interstate Commerce Act or any of the hundreds of statutes or decisions which have in terms more severe and rigid even than those of the Cartwright Act attempted to safeguard our economic tradition of free enterprise and free competition.

It is scarcely necessary to point out that the effect of this case goes far beyond the interest of the petitioner in it. The suppression of monopolistic practices that deliberately and nakedly seek to destroy competition is so definitely a public interest that in the case referred to (*Georgia v. Pennsylvania R.R.*, supra) the State was permitted to bring the action itself as *parens patriae*. It is for that reason that in this case the Attorney General of California has joined the petitioner in this petition to review the case at bar. The State of California as *parens patriae* is vitally concerned when practices are declared to be lawful and free from any State control, which destroy

the livelihood of its citizens and render them subject to exactions or driven from any field of enterprise, by combination and conspiracy of those who control business in any field.

CONCLUSION.

The petition for a writ of certiorari in this case is, therefore, based on the fact (cf. Rule 38 of the Supreme Court, 5a) that the District Court of Appeal of California has decided an important federal question which has not heretofore been determined by this court, to wit:

(a) That as a matter of federal law an amendment of a state statute which is made in a different session from that in which the statute itself was enacted and which is declared to be unconstitutional in some of its aspects will cause the entire statute in all its aspects to be void as in violation of the Constitution of the United States;

(b) That a state statute violates the Fourteenth Amendment to the Constitution of the United States if it allows a civil action against those who have combined to restrain trade.

(c) That a statute invalidating restraint on comment of a state statute which is made in a different dered under public license, is unconstitutional, when enforced by an action for civil remedies, without invoking criminal penalties.

(d) That the attempt of a state to control monopoly in intrastate commerce, by defining monopoly as a combination which earns unreasonable profits, is void under the Fourteenth Amendment of the Constitution of the United States.

The writ of certiorari should be granted by this Court to the end that a correct decision on this important federal question may be had.

Dated, San Francisco, California,
April 16, 1945.

Respectfully submitted,

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